

STATE OF MICHIGAN
IN THE SUPREME COURT

DONALD E. TATE,

Plaintiff-Appellee,

-vs-

BOTSFORD GENERAL HOSPITAL,
a Michigan Non-Profit Corporation,

Defendant-Appellant,

Supreme Court No. 126603

Court of Appeals No. 245081

Oakland County Circuit Court
Case No. 01-035359-NO

DEFENDANT'S SUPPLEMENTAL BRIEF

AFFIDAVIT OF SERVICE

TANOURY, CORBET, SHAW,
NAUTS & ESSAD, P.L.L.C.

By: Linda M. Garbarino (P38359)
Attorney for Defendant-Appellant
Botsford General Hospital
645 Griswold, Suite 2800
Detroit, Michigan 48226
(313) 964-6300

126603
2

FILED
FEB 24 2005
CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

TABLE OF CONTENTS

	<u>Page</u>
INDEX OF AUTHORITIES	i
ARGUMENT	1
EXPERT TESTIMONY IS NECESSARY TO ESTABLISH WHETHER THE PATIENT WAS COMPETENT TO RESCIND PRIOR CONSENT.	1
RELIEF REQUESTED	7

INDEX OF AUTHORITIES

Cases

Page

<u>Bryant v Oakpointe Villa Nursing Centre</u> , 471 Mich 411; 684 NW2d 864 (2004), <u>reh den</u> 471 Mich 1201 (2004)	1
<u>In re Conroy</u> , 98 NJ 321, 382; 486 A2d 1209 (1985)	4
<u>In re Guardianship of Grant</u> , 109 Wash 2d 545; 747 P2d 445 (1987), <u>modified</u> 757 P2d 534 (1988)	5
<u>In re Martin</u> , 200 Mich App 703; 504 NW2d 917 (1993)	4
<u>In re Martin</u> , 450 Mich 204; 538 NW2d 399 (1995), <u>cert den</u> 516 US 1113 (1996)	4
<u>In re Rosebush</u> , 195 Mich App 675; 491 NW2d 633 (1992)	4
<u>Lawrenchuk v Riverside Arena, Inc.</u> , 214 Mich App 431; 542 NW2d 612 (1996)	2, 3
<u>O'Dowd v Linehan</u> , 385 Mich 491; 189 NW2d 333 (1971)	2

Statutes

MCL 333.20201(2)(f)	3
MCL 333.20201(2)(l)	3

ARGUMENT

EXPERT TESTIMONY IS NECESSARY TO ESTABLISH WHETHER THE PATIENT WAS COMPETENT TO RESCIND PRIOR CONSENT.

Although plaintiff's complaint is couched in terms of a false imprisonment claim, the claim nonetheless arises within the context of medical treatment provided by the defendant hospital to the plaintiff. As discussed in defendant's brief, consent was provided by the plaintiff for treatment "deemed necessary or advisable by the physician" (see Exhibit 1-B to defendant's application). Further, the plaintiff consented to treatment under emergency situations stating that he understood that in emergency situations "it may be necessary or advisable for the physicians to perform other additional or extended services beyond those planned at the time of admission in order to preserve my life or health. I consent to these services and/or procedures" (Exhibit 1-B to application).

The question presented in this case is whether plaintiff was competent to withdraw consent during the giving of such emergency procedures. As set forth in defendant's brief, the only expert evidence presented was that submitted by the defendant. An affidavit of the emergency room physician was submitted which established both that the treatment provided was necessary due to a reaction to the medicine compazine which developed into an "emergent condition which was life threatening" and which "mandated immediate care and treatment" and that plaintiff was not "sufficiently alert or sufficiently mentally competent to refuse treatment" (see Exhibit 2 to application).

While plaintiff's claim in the complaint is false imprisonment, the basis for the false imprisonment claim arises out of the professional physician-patient relationship of the parties and the medical judgment of the defendant. In Bryant v Oakpointe Villa Nursing Centre, 471 Mich 411; 684 NW2d 864 (2004), reh den 471 Mich 1201 (2004), this Court addressed the need of expert testimony in actions alleging medical malpractice. Defendant submits that the Court's

reasoning in that case applies by analogy to this false imprisonment claim. In cases which raise questions involving medical judgment, this Court recognized that expert testimony is required:

After ascertaining that the professional relationship test is met, the next step is determining whether the claim raises questions of medical judgment requiring expert testimony or, on the other hand, whether it alleges facts within the realm of a jury's common knowledge and experience. If the reasonableness of the healthcare professional's action can be evaluated by lay jurors, on the basis of their common knowledge and experience, it is ordinary negligence. If, on the other hand, the reasonableness of the action can be evaluated by a juror only after having been presented the standards of care pertaining to the medical issue before the jury explained by experts, a medical malpractice claim is involved. [471 Mich at 423.]

In this case, the question of competency at issue is beyond the jury's common knowledge and experience and can only be evaluated with the appropriate expert testimony. Even if such is not strictly characterized as a claim of medical malpractice, expert testimony is nonetheless required to establish a prima facie case. In O'Dowd v Linehan, 385 Mich 491; 189 NW2d 333 (1971), this Court defined the use of and need for an expert:

The use of an expert is similar to that of the translator – the evidence which has been presented to the jury cannot be adequately comprehended, analyzed and weighed by it without the aid of the specialized knowledge of the expert as to the meaning and significance of the facts in evidence. [385 Mich at 508.]

Citing as an example the use of fingerprint evidence, the O'Dowd Court stating that while fingerprint evidence “may be a vital link in establishing” a defendant's guilt, “[f]ingerprints are like a foreign language. It takes the work of a fingerprint expert and his opinion with regard to identification to forge that vital link.” Id. at 509.

The courts have recognized the need for expert testimony to establish a prima facie case in cases other than medical malpractice claims. In addition to those cases cited in defendant's application, the Court of Appeals in Lawrenchuk v Riverside Arena, Inc, 214 Mich App 431; 542 NW2d 612 (1996) held that expert testimony was required in a case alleging a design defect. In that case, the Court of Appeals held that summary disposition was properly granted as to a claim brought by a roller skater for injuries allegedly sustained due to a defect in the rink's design. The

Court of Appeals in Lawrenchuk held that the plaintiff was required to produce an expert to demonstrate the unreasonable risks alleged to exist as a result of the rink's design. In the absence of such expert testimony, the court held that summary disposition was properly granted:

[I]n the absence of expert testimony providing standards for evaluating the relevant risks and advantages of this particular rink design, a jury would be denied an objective framework by which to evaluate plaintiff's claim, thus precluding any genuine determination whether the design was unreasonable. [214 Mich App at 434.]

The use of restraints in an emergency situation has also been addressed by the Legislature in MCL 333.20201(2)(l), which statute articulates a standard regarding the use of restraints necessitated by an emergency. In this statute, health facilities are required to adopt policies describing the rights and responsibilities of patients admitted to its facility. Among others, such policies are to address the use of restraints. In subsection 20201(2)(l), the Legislature articulated the following guidelines:

A patient or resident is entitled to be free from mental and physical abuse and from physical and chemical restraints, except those restraints authorized in writing by the attending physician for a specified and limited time or as are necessitated by an emergency to protect the patient or resident from injury to self or others, in which case the restraint may only be applied by a qualified professional who shall set forth in writing the circumstances requiring the use of restraints and who shall promptly report the action to the attending physician. In the case of a chemical restraint, a physician shall be consulted within 24 hours after the commencement of the chemical restraint. [Attached as Exhibit A]¹

¹ The Court of Appeals focused in on subsection 20201(2)(f) which provides that a hospital policy describing the rights and responsibilities of patients shall include at a minimum that a patient is entitled to refuse treatment:

A patient or resident is entitled to refuse treatment to the extent provided by law and to be informed of the consequences of that refusal. When a refusal of treatment prevents a health facility or its staff from providing appropriate care according to ethical and professional standards, the relationship with the patient or resident may be terminated upon

The statute only requires that the physician believe that the restraints are necessitated by an emergency to protect the patient from injury to himself. In this case, that was the specific reason the restraints were applied. Further, the doctor believed that the patient was neither sufficiently alert or sufficiently mentally competent to refuse this life saving treatment. In compliance with the statute, a formal written order was completed by that doctor (see Exhibit 6 to application).

In the first Court of Appeals decision in In re Martin, 200 Mich App 703; 504 NW2d 917 (1993), the Court of Appeals adopted the following test for determining if a person has the requisite capacity to make a decision concerning the withholding or withdrawal of life-sustaining medical treatment:

Whether the person (1) has sufficient mind to reasonably understand the condition, (2) is capable of understanding the nature and effect of the treatment choices, (3) is aware of the consequences associated with those choices, and (4) is able to make an informed choice that is voluntary and not coerced. [200 Mich App at 716, quoting In re Conroy, 98 NJ 321, 382; 486 A2d 1209 (1985).]

While this Court in In re Martin, 450 Mich 204, 217, n 10; 538 NW2d 399 (1995), cert den 516 US 1113 (1996), did not per se endorse this standard regarding competency, the standard articulated by the Court of Appeals clearly reflects that questions of competency so as to refuse life saving treatment are ones which can only be determined through the aid of expert testimony.

Further, in In re Martin, this Court recognized that the state has an interest in the preservation of life and that the patient's right to refuse life-sustaining medical treatment is not absolute and must be balanced against the countervailing interest of the state. Id. at 216, n 9. In In re Rosebush, 195 Mich App 675, 681 n 2; 491 NW2d 633 (1992), the Court of Appeals set forth the following countervailing state interests:

reasonable notice.

However, the Court of Appeals failed to recognize that this same statute has specific guidelines regarding the use of restraints which use was followed in this case.

(1) the preservation of life, (2) the protection of innocent third parties, (3) the prevention of suicide, and (4) the maintenance of the ethical integrity of the medical profession. [Quoting In re Guardianship of Grant, 109 Wash 2d 545; 747 P2d 445 (1987), modified 757 P2d 534 (1988).]

In this case, both the state's interest "in the preservation of life" and the state's interest "in the maintenance of the ethical integrity of the medical profession" is served by recognizing a limitation on a patient's right to refuse life saving medical treatment. In this case, the doctor was faced with the prospect that the plaintiff would remove a tube believed to be essential for plaintiff's continued ability to breathe. The plaintiff's respiratory rate was affected by an adverse reaction to medicine and the doctor believed that this adverse reactions could lead to death if not properly treated. The doctor further believed, as set forth in her affidavit, that the patient was not sufficiently competent or alert to understand his condition. As a result, the doctor ordered restraints, for a limited time, so that the patient would not extubate himself by removing the nasally placed intubation tube. The doctor believed that if the patient extubated himself it would cause injury to and jeopardize his airway and possibly cause death. In satisfaction of the Legislature's policy guidelines for the use of restraints, the doctor prepared written documentation of the need for the restraints. Here, there was no time to secure a court order. The doctor, faced with an emergency life threatening situation and believing the patient as a result of the medication reaction to be incompetent to withdraw consent to the treatment, followed the statutory guidelines and ordered restraints. Plaintiff's right to refuse such treatment must give way in such a case to the state's interest in preserving life and protecting the ethical integrity of the medical profession.

Defendant again submits, as it did in its application, that this is a case involving questions of competency beyond the realm of the ordinary layman and that expert testimony was required to defeat summary disposition. Without such expert testimony, plaintiff is unable to establish a prima facie case of false imprisonment as plaintiff cannot establish "restraint without authority". Plaintiff needed expert testimony to establish that a jury question existed to show that plaintiff was competent at the time of the use of restraint so as to refuse this life saving medical care and


treatment provided. Without that evidence, summary disposition was properly granted as plaintiff failed to satisfy his burden of proof to establish a question of fact for the jury.

RELIEF REQUESTED

WHEREFORE, defendant-appellant, BOTSFORD GENERAL HOSPITAL, a Michigan non-profit corporation respectfully requests that this Honorable Court peremptorily reverse the Court of Appeals decision reversing the trial court's grant of defendant's motion for summary disposition. In the alternative, defendant requests that this Honorable Court grant its application for leave to appeal. Finally, defendant requests costs and attorney fees.

Respectfully submitted,

TANOURY, CORBET, SHAW,
NAUTS & ESSAD, P.L.L.C.

By: 
LINDA M. GARBARINO (P38359)
Attorney for Defendant-Appellant
645 Griswold Street, Suite 2800
Detroit, Michigan 48226
(313) 964-6300

DATED: February 23, 2005

I:\LMG\APPEALS\STATE\Pleadings\SCtSuppBrief.wpd